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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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3 SETH D. HARRIS, (THOMAS E.  
3 PEREZ) ACTING SECRETARY OF THE  
4 UNITED STATES DEPARTMENT OF  
4 LABOR,

5  
5 Plaintiff,

6  
6 v. 13 Misc 213 (JPO)

7  
7 BRUCE JACOBSON, et al.,

8  
8 Defendants.

9  
9 -----x

10  
10 August 6, 2013  
11 3:45 p.m.

11  
12 Before:

12  
13 HON. J. PAUL OETKEN,  
13  
14 District Judge

14  
15 APPEARANCES

15  
16 U.S. DEPARTMENT OF LABOR  
16 Attorneys for Plaintiff  
17 BY: MICHAEL R. HARTMAN  
17 ERIC C. LUND

18  
18 JACKSON LEWIS  
19 Attorneys for Respondents  
19 BY: DAVID R. JOHANSON  
20 DOUGLAS A. RUBEL

21  
21 OLSHAN FROME WOLOSKY LLP  
22 Attorneys for Respondents  
22 BY: THOMAS J. FLEMING

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1 THE DEPUTY CLERK: All rise. You may be seated.  
2 (Case called)  
3 MR. HARTMAN: Michael Hartman on behalf of the  
4 Secretary of Labor, your Honor.  
5 MR. LUND: Eric Lund on behalf of the Secretary of  
6 Labor, your Honor.  
7 THE COURT: Good afternoon.  
8 MR. LUND: Good afternoon.  
9 MR. JOHANSON: David Johanson, your Honor, on behalf  
10 of the respondents.  
11 MR. RUBEL: Douglas Rubel, your Honor. Good  
12 afternoon.  
13 THE COURT: And?  
14 MR. HARTMAN: Thomas Fleming also for respondents.  
15 THE COURT: Good afternoon.  
16 Okay, this is a Part One matter, and I've had a chance  
17 to review the parties' submissions, but I'll hear from you as  
18 well.  
19 The Secretary of Labor moves to enforce administrative  
20 subpoenas and really, as I see it, the issue is just privilege  
21 logs. There's no issue of undue burden or anything really,  
22 although there's obviously burden in doing an eighth privilege  
23 log or wherever they are. But as I see it the -- well, maybe  
24 I'll have you go through and tell me what the buckets of issues  
25 are.

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1 But as I see it, the main issues are whether the  
2 communications with financial advisors and other independent  
3 contractors do or do not waive otherwise privileged  
4 communications if in fact they involve requests for legal  
5 advice or the rendering of legal advice by virtue of the  
6 (phonetic) Horry Doctrine of the financial advisor exception  
7 that Judge Friendly made up in the 60's, or I shouldn't say  
8 made up, but that he articulated in the 60's, which is a very  
9 narrow doctrine, or the functional equivalent of an employee  
10 doctrine, which I think is fairly narrow too in the Southern  
11 District, although there are -- on that doctrine I'm obviously  
12 revealing, you know, sort of where I'm thinking about this.  
13 But I'm going to give you all a chance to convince me  
14 otherwise.

15 On the functional equivalent doctrine, there are  
16 cases, including -- I've actually had a chance to look at the  
17 Eastern District of Pennsylvania case and some other cases that  
18 really do take different approaches on that issue. I will say  
19 that Magistrate Judge Davidson and Francis have written a  
20 couple of opinions in the Southern District adopting a pretty  
21 narrow approach to that. So there are those issues.

22 What are the other categories of issues that I need to  
23 know about Mr. is it Hartman?

24 MR. HARTMAN: Yes. Thank you, your Honor.

25 May it please the Court, if I may provide a very brief

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1 context here for the petitioner. The Secretary's investigating  
2 a hundred million dollar transaction as a result of which Mr.  
3 Jacobson and Mr. Lewkowitz have received \$20 million and are  
4 due to receive each tens cents of millions of dollars more.

5 THE COURT: But they already, in 2008, they reduced  
6 the amount that they were receiving, right?

7 MR. HARTMAN: That appears to be the case. But  
8 they're still receiving roughly \$80 million. So it's a  
9 substantial transaction, and it appears to have violated title  
10 One of ERISA. Secretary is seeking to enforce these subpoenas  
11 that have been outstanding since October. And as your Honor  
12 pointed out, the primary issue is the privilege and the  
13 privilege logs. And they're really kind of a mess here. There  
14 are nine logs which have been amended, which are inconsistent,  
15 which are lacking critical information, and so it's been  
16 difficult for the Secretary to articulate in his papers the  
17 range of issues.

18 I think the financial advisor exception that your  
19 Honor noted is one of those and that clearly, as your Honor  
20 pointed out, a narrow doctrine and is not supported here, where  
21 respondents have failed to show that there was originally  
22 privileged communication and that the financial advisor was  
23 necessary for the communication of a provision of legal advice.

24 But there are other issues as well which are  
25 identified in the Secretary's petition and in the other briefs.

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1 There is an assertion of work product over business  
2 negotiations where potential litigation is purely hypothetical  
3 at best.

4 THE COURT: Let me ask you -- yes, there wasn't really  
5 much argument on work product. I didn't think any showing of  
6 work product at all by respondents. But are there any work  
7 product designations that aren't also attorney-client privilege  
8 designations?

9 MR. HARTMAN: There are, your Honor. We've identified  
10 them in our brief.

11 The problem, and part of the difficulty for the  
12 Secretary today is that the logs and their numbering continues  
13 to change. So it's a bit of a challenge for us to point your  
14 Honor to anything specific.

15 So the first thing that we would ask your Honor to  
16 order is that respondents produce a single unified privilege  
17 log with the unique identifier that doesn't change, so if a  
18 document, there is a document one, that document is forever  
19 document one. It's really a basic corollary of Rule 26 and  
20 Rule 33, so.

21 But there are examples that apply to work product, and  
22 there are also examples where the attorney-client claims are  
23 fairly specious, and so the only remaining claim would be work  
24 product. So once you get rid of this financial advisor  
25 exception, all you have is work product.

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1 But beyond, looking at attorney client again for a  
2 moment. Beyond the financial advisor exception, and in fact  
3 the employee doctrine which your Honor has identified,  
4 respondents are trying to protect a number of documents that  
5 have nothing to do with the provision of legal advice from the  
6 descriptions on the privilege log. And we actually have a  
7 nifty little natural experiment there. Respondents' counsel  
8 produced several of these documents at a deposition and said we  
9 could have asserted privilege over these, but we're choosing to  
10 produce them to you. They're absolutely not privileged.  
11 They're basic business documents. If there are lawyers  
12 involved, that does not change the fact that they're business  
13 advice and not subject to the attorney-client privilege.  
14 There's also the issue, which is a fairly narrow  
15 issue, of withholding of documents that are deemed  
16 confidential, but over which no proper privilege has been  
17 asserted. And the issue --  
18 THE COURT: You mean the trade secrets.  
19 MR. HARTMAN: Yes, trade secrets.  
20 THE COURT: There are only like three of those, right?  
21 MR. HARTMAN: There are only like three of them.  
22 THE COURT: Okay.  
23 MR. HARTMAN: There are documents that are shared with  
24 negotiating adversaries. Actually Great Bank, who is the party  
25 who is opposite People Care here, is listed on these privilege

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1 logs, and their counsel is identified in the key of attorneys.  
2 So it's really just a very sloppy job of asserting privilege.  
3 So we would ask your Honor first to order, as I mentioned at  
4 the outset, a comprehensive and compliant privilege log.

5 I think that those are the general issues. There's no  
6 issue of, that the Secretary is aware of, of failure to produce  
7 documents. Obviously, the Secretary's concerned that some  
8 documents were produced at depositions, but had not previously  
9 been identified on logs, but we can only hope that that is at  
10 this point been cured. So the attorney-client privilege and  
11 the work product are all that is at issue here.

12 Briefly, your Honor, I don't think I mentioned, there  
13 are a number of documents that appear to have been prepared in  
14 the ordinary course of business that are attached to  
15 communications with counsel, and that respondents are seeking  
16 to withhold by asserting attorney-client privilege over the  
17 parent e-mail, I guess you would call it. And the law is very  
18 clear in the Supreme Court and the Second Circuit, as well as  
19 in this district; that simply passing something to an attorney  
20 and asking for advice on that document does not render the  
21 preexisting document privileged.

22 Respondents have said they produced all these  
23 documents. Their logs show that's obviously not the case. So  
24 we've had a real problem with cooperation here with  
25 respondents. It took us until June just to get Mr. Johanson to

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- 1 identify which of his clients is asserting the privileges here.  
2 Despite that lack of cooperation, we're not trying to infringe  
3 on the legitimate claims of privilege. We're just policing its  
4 abuses where it infringes with the Secretary's -- with the  
5 Secretary's investigation. So we're not seeking broad waiver.  
6 All we're asking is that your Honor order that where the  
7 privilege has not been proven, where the facts have not been  
8 given to support a claim of privilege, those documents be  
9 produced to the Secretary.
- 10 THE COURT: So are you asking for -- the binders that  
11 I have, I wasn't clear on -- well, I guess these are from your  
12 adversary. Are you asking for me to order them to make a new  
13 privilege log that identifies -- there were some complaints  
14 about lawyers not listed for everything. Has that been fixed  
15 now or is that still a live issue?
- 16 MR. HARTMAN: No, that's still a live issue. Yes, so  
17 the first -- what we would like your Honor to order first is to  
18 produce a single comprehensive privilege log making only the  
19 legitimate claims, none of the spurious claims that we've  
20 pointed out in our 100 examples, none of which respondents have  
21 addressed, and then to make the substantive legal rulings that  
22 I've discussed, and I'm happy to address further.
- 23 THE COURT: Is it a waiver issue -- like the ones that  
24 you talk about with the financial advisor exception and the de  
25 facto employee issue, are those where they've claimed privilege

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1 or where something is clearly going to one of those or where  
2 someone was c.c.'d, and you're arguing that even if it would  
3 otherwise be privileged, it was waived because it was -- they  
4 were included in an e-mail.

5 MR. HARTMAN: Your Honor, I think the answer is both.  
6 It's difficult to discern the two from the privilege logs.  
7 Clearly in order to have an application of the de facto  
8 employee doctrine or the financial advisor exception, you need  
9 to have an underlying protected communication. And then if a  
10 nonprivileged party, a non-confidential party is included in  
11 that, that can be waived. So we think in the first case that  
12 some of these documents were not privileged. They're business  
13 communications that happen to copy attorneys, but it doesn't  
14 make them privileged. And in other cases, they may otherwise  
15 have been confidential, but the presence of this third party  
16 waives the privilege or eliminates the confidentiality that's  
17 required for the privilege. So whether your Honor wants to  
18 consider it waiver or failure to complete the ring of  
19 confidentiality, I think it gets to the same place.

20 THE COURT: Okay, thank you.

21 MR. HARTMAN: Thank you.

22 THE COURT: Mr. Johanson.

23 MR. JOHANSON: Good afternoon, your Honor.

24 THE COURT: Good afternoon.

25 MR. JOHANSON: Just to follow Mr. Hartman's lead, if  
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1 you don't mind, to make it more organized here today.

2 THE COURT: Sure.

3 MR. JOHANSON: First of all in response to -- we're  
4 not going to get into the substantive issues today with your  
5 Honor, but we do want to address a couple of points.

6 First of all, you did correctly note that our clients  
7 did reduce the original transaction amount from 104 million to  
8 80 million in December of 2008 with the involvement of an  
9 entire ESOP advisory team and corporate advisory steam team.

10 In addition, your Honor, at the end of December of  
11 2012, the respondents, our clients, Mr. Jacobson and  
12 Mr. Lewkowitz, reduced their promissory notes by another 16  
13 million.

14 On top of that, your Honor, the Secretary spend the  
15 last almost year addressing a, what we believe to be a red  
16 herring in this case. And I'm not going to spend a lot of time  
17 on, but I just want to point it out to you. The Secretary had  
18 challenged whether or not our clients had been forthright with  
19 the ESOP advisory team consisting of Great Bank Trust Company,  
20 the independent appraiser and financial advisor Stout Risius  
21 Ross and Steicker Fischer law firm, and we presented evidence  
22 through the testimony of Mr. Jacobson in his deposition on  
23 April 12th, 2013 that basically debunked that whole approach to  
24 that red herring issue. So from our perspective there is no  
25 violation of ERISA here.

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1 That said, I know that's not what you're here to deal  
2 with today, your Honor. Mr. Hartman talks about a mess, your  
3 Honor. He mentions a mess and a bunch of privileged logs.

4 What we've done, your Honor, during the last nine  
5 months is every time that Mr. Hartman has asked us to try to  
6 fix something, quote unquote, that he believed to be incorrect  
7 or wrong with our privilege logs, we have responded for the  
8 most part and fixed the issues that he raised.

9 The only issues that we believe are, the only issue  
10 that we believe is left at this point in time is whether or not  
11 we're going to be required to look at 3600 entries and define  
12 exactly what the attachment is on each one of those entries,  
13 which we think, in and of itself, may reveal privilege, your  
14 Honor. And so we're troubled by that and we're troubled by the  
15 amount of time it might take.

16 THE COURT: What have you done already? Haven't you  
17 gone document by document and identified the nature of the  
18 issue; have you done it by categories?

19 MR. JOHANSON: We've done it -- we've used two  
20 different services to do so at two different law firms, and  
21 we've done a, I think a very good job of identifying a  
22 privilege log, which doesn't leave the Secretary in doubt about  
23 what position we're taking. And as I said, I believe the only  
24 issue left is whether or not there is -- we defined each  
25 attachment fully in each particular privilege log entry, and

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1 that's 3600 entries. We did a sample of this, your Honor. It  
2 took one of my associates about 12 hours to go through 500  
3 entries, and it took one of my paralegals nine hours to go  
4 through 100 entries. So we believe that would be burdensome,  
5 unduly burdensome and over broad for us to have to go through  
6 that. But of course subject to your order, we'll do whatever  
7 you request or you order.

8 Your Honor, as I said, we've done what the Secretary's  
9 asked for. We've perfected the logs in the manner in which the  
10 Secretary has asked us to do so, and I think we've done it  
11 quite well. We clearly take issue with the point that things  
12 are in a mess at this point.

13 The second thing, your Honor, on the work product if I  
14 could, I want to point out, and maybe we failed to say this in  
15 our pleadings, and I'm sorry if we didn't say this in our  
16 pleadings in response to the Secretary's petition. There are  
17 six different cases that relate to the work product position  
18 that we've taken, your Honor. One is People Care Inc. versus  
19 Cityo New York HRA. I got an index number for that of 109193  
20 and 2009. I've got People Care Inc. versus City of New York  
21 Human Resource Administration, index number 111467. That's in  
22 2011. I've also got three different National Labor Relation  
23 Board cases and I believe there are a number of unfair labor  
24 practice charges that have been brought, all of which relate to  
25 the work product position that we've taken on the privilege

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1 logs. And I could give the case numbers I will --  
2 THE COURT: You don't need to.  
3 MR. JOHANSON: Okay. Anyway, I believe our position  
4 maybe we failed to say that to you properly in our response to  
5 the petition, your Honor, in the opposition, but we believe the  
6 work product position is well taken here, where we took it.  
7 THE COURT: Okay.  
8 MR. JOHANSON: In terms of the single unified  
9 privilege log. Again, we did nothing to try to confuse the  
10 Secretary. We tried to do what the Secretary asked us to do.  
11 I've got a well structured summary of what we produced, and I'm  
12 more than happy to provide that to the Secretary in addition to  
13 everything we've done in order to avoid us having to go back  
14 and combine all of this work into one. But of course we will  
15 subject to your order, do whatever you request your Honor.  
16 One of the things that we think is important here, we  
17 believe that this, and a lot of the cases that your Honor has  
18 looked at and we've looked at talk about an in-camera review.  
19 We would be fine with, and have proposed having your Honor  
20 refer this to a Magistrate Judge or certainly do it yourself if  
21 that's what you like, but the last one of these cases I was  
22 involved in, I sat in court for about four hours with the  
23 Magistrate Judge and I worked through the issues. The  
24 Secretary had its representative there, I had -- I didn't have  
25 my client, but I had access to my client and we worked through

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1 the issues and we resolved them. So I think we could winnow  
2 this down, narrow it down, present arguments quite well in that  
3 respect. I've got, your Honor, I've got 15 examples right here  
4 that I certainly can't provide to the Secretary right now, but  
5 they are 15 good examples of where the financial advisor  
6 privilege applies in our opinion, where there is either the  
7 need to have a financial advisor like BCC Capital who is an  
8 expert in ESOP transactions, and Mr. Josephson and his CPA firm  
9 involved, they also were experts in handling large hundred  
10 million dollar plus ESOP transactions. And what happens in an  
11 ESOP deal, your Honor, you may or may not know, is that you  
12 have to hire -- the company that sponsors the ESOP has to hire  
13 an ESOP advisory team in a deal of this nature, an  
14 institutional independent discretionary trustee. That trustee  
15 has hires an independent appraiser and financial advisor. That  
16 trustee also hires legal counsel. You've got legal counsel in  
17 the corporate side, you may have legal counsel representing the  
18 selling shareholders. It's a complicated deal when you're  
19 talking about a hundred million dollar deal. So in our opinion  
20 looking at the case law we've cited in our opposition, we do  
21 squarely meet financial advisor exception to the  
22 attorney-client privilege with respect to a number of these,  
23 and we'd like that to be reviewed either by yourself or  
24 Magistrate Judge in detail. And we've got some examples we  
25 could share with you that would address that very point.

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1 THE COURT: But generally, ESOP advisor, I mean from  
2 the papers I'm certainly not persuaded that it applies. I  
3 mean, the financial advisor exception is sort of a translator  
4 function where to articulate a situation for the purpose of  
5 obtaining legal advice you get a financial advisor involved.  
6 But when you're a company and you're doing some big deal -- I  
7 used to do this when I was in-house all the time -- when I had  
8 a financial advisor in the room, it was not privileged, and I  
9 made everyone know that. When we had an auditor in the room,  
10 there is no auditor privilege in New York, I made -- I let  
11 everyone know. And afternoon in-house lawyers know this, there  
12 is -- when you let a financial advisor into the communication  
13 group circle, it's not privileged, I mean -- and I just don't  
14 know what, you know, what's hard about that.

15 MR. JOHANSON: Well, your Honor, with all due respect,  
16 and of course you deserve a lot of it --

17 THE COURT: Not really.

18 MR. JOHANSON: -- I do take issue with that position.  
19 And I think we've explained that in our pleading papers quite  
20 well. And I think the case law has evolved from Koval up to  
21 the Ackard case, as well as some of the other cases we've  
22 cited, and I'd be glad to go through them and explain the  
23 factual circumstances of those cases relative to ours and why  
24 we're on point there and why our financial advisor is their --  
25 these financial advisors -- there wasn't anybody like that at

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1 the company who had that knowledge. I don't know what -- I do  
2 know what company you worked at, but I don't know if you had  
3 somebody like that.

4 THE COURT: You guys represented us.

5 MR. JOHANSON: Well, actually that's true and I did, I  
6 did do that.

7 THE COURT: But it's one thing, and this sort of brings  
8 together the functional equivalent of employee situation; if  
9 you're, you know, if someone's coming in and they're an  
10 independent contractor and they're, you know, you give them an  
11 office, you might give them a e-mail and they're basically  
12 functioning as an employee, that's one thing. But if you hire  
13 a financial firm and an appraisal firm, you know, a valuation  
14 firm or whatever, or your auditor is there for a specific task,  
15 that's just a third party that you've hired to do a task. And  
16 the fact that you've hired them to do this big ESOP transaction  
17 is not a big piece of legal advice. It's just not. I mean,  
18 it's a big financial transaction.

19 MR. JOHANSON: I think it's a large financial  
20 transaction that has substantial legal implications as is  
21 presented by my adversaries on the other side here, who go  
22 around the country, investigate closely held ESOP companies and  
23 file litigation throughout the country. So your Honor, I think  
24 it has financial implications, but it also has legal  
25 implications that flow from the financial considerations.

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1 You've got technical legal issues that are derived from the  
2 financial information that is provided to the ESOP advisory  
3 team. So I think there a mix, your Honor. I really would like  
4 you please take a look at, if you don't mind, In Re: Bider,  
5 it's the Eighth Circuit I realize, but to me that's a case  
6 that's really close to our case. That case talks about a  
7 situation which the company hired -- it was a real estate  
8 development company, and it hired an independent contractor to  
9 come in and virtually attend all the meetings and help them get  
10 a real estate, complicated real estate project approved, your  
11 Honor.

12 In that case it's very clear that the lawyer was there  
13 or, excuse me, the independent contractor was there either  
14 functionally as an employee or as a financial advisor whose  
15 advice and input was needed in order to accomplish the real  
16 estate transaction that they were trying on accomplish in the  
17 first place. And I really believe it's right on point and  
18 addresses both the employee position and the functional  
19 employee position, as well as the financial advisor position  
20 that we provided to you.

21 I also believe that Acard distinguishes Koval quite  
22 nicely here. And, again, I would ask you to take a look at the  
23 Acard case, the Second Circuit 1999, which again focuses on  
24 communications that distinguishes the important position that  
25 the Koval case focused on. This is not just important advice.

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1 If you do this wrong, you get these gentlemen here and the  
2 Secretary of the U.S. Department of Labor filing a hundred  
3 million dollar lawsuit against you or 50 million dollar lawsuit  
4 against you, and that's serious business. And so, therefore,  
5 it's important to have -- and there are technical issues that  
6 raised by the IRS as well. So it's important to have the  
7 financial advisor like an independent financial advisor BCC  
8 Capital and an expert accountant to tell the lawyer things that  
9 are interpreting and translating technical legal issues that  
10 flow from the financial information that's being provided to  
11 make the deal happen, in our opinion.

12 THE COURT: But their function isn't to help the  
13 lawyers. I mean, their function is to put deal together,  
14 right? And obviously there are important legal implications  
15 and you have to do it right, you have to follow ERISA and all  
16 stuff. But the primary purpose of their involvement is to do  
17 the transaction, right?

18 MR. JOHANSON: Their primary purpose in my opinion,  
19 and I've been on -- you know, I've been involved in hundreds of  
20 these ESOP transactions since the early 1980's, their primary  
21 purpose is to assist the lawyer in explaining complicated  
22 structures to the clients so that we accomplish a transaction  
23 in a way that's compliant with ERISA, in my opinion. Because  
24 it is a very complicated statute, with severe consequences as  
25 we see today.

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1 Your Honor, if you don't mind, and I do appreciate  
2 your view, and I hope you've -- we just wanted to share with  
3 you a slightly different view of the subject matter.

4 THE COURT: Sure. Let me ask you while I'm thinking  
5 about it, how many documents are disputed at this point?

6 MR. JOHANSON: Well, your Honor, we produced 108,000  
7 pages, and we only have on our privilege log -- I think on our  
8 primary privilege log it's about 1500 entries on our primary  
9 privilege log. So out of that 108,000 this isn't -- I'm sorry  
10 I can't represent to you exactly how many pages that is, but  
11 it's not the large portion of the production that we did.  
12 We've done 108,000 pages since November of last year.

13 THE COURT: Do you want to clarify?

14 MR. HARTMAN: Yes. It's roughly 3,000 documents over  
15 which respondents have asserted privilege. And comparing pages  
16 and documents is apples to oranges. But it appears to the  
17 Secretary that it may be as much as half of the documents  
18 involved in the case. So these are very very broad assertions  
19 of privilege. We're not going to deny pages have not been have  
20 been produced here, but they don't seem to be the central  
21 documents. The central documents seem to be hidden behind  
22 these assertions of privilege, 3,000 of them roughly.

23 THE COURT: Okay.

24 MR. JOHANSON: Your Honor, I do take great issue with  
25 that statement. And we'd be more than happy to identify

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1 exactly how many pages and share that with the Court.  
2 Your Honor, a couple of other things if you don't  
3 mind, and I know your schedule is tight here, we're at the end  
4 of the day.

5 THE COURT: Sure.

6 MR. JOHANSON: Mr. Hartman indicated earlier that  
7 Great Bank Trust Company was listed on the privilege log. I  
8 think that was a disingenuous example to share with the Court.  
9 Yes, there were a couple of examples where we made errors and  
10 we put communications on a privilege log with a 108,000 pages  
11 of production that were inaccurate and incorrect. And we  
12 corrected them as soon as Mr. Hartman pointed had them out to  
13 us. And so I think that's unfair and inappropriate to raise  
14 that today.

15 I think it's unfair and inappropriate to characterize  
16 our efforts as sloppy. They're not sloppy, your Honor. We  
17 spent a lot of time, a lot of attorneys hours and paralegals  
18 hours to accomplish this. And I know that my employees would  
19 not be happy to hear that their work was referred to as sloppy  
20 today, because it wasn't.

21 Your Honor, the major issue in this case so far in  
22 this discovery matter is, is a call back. So we had a meet and  
23 confer with Mr. Hartman quite some time ago where we believe  
24 that he should have returned the documents to us and,  
25 immediately. And what happened was we had to fight over that,

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1 fight over the fact that --  
2 THE COURT: Are these the BCC documents?  
3 MR. JOHANSON: Excuse me? Yes, they are, your Honor.  
4 THE COURT: Tell me exactly what -- BCC is one of the  
5 entities you claim is an independent contractor.  
6 MR. JOHANSON: Yes, your Honor.  
7 THE COURT: Acting as employees?  
8 MR. JOHANSON: They're a, they're a specialist in ESOP  
9 transactions, who accomplish large ESOP transaction for very --  
10 a number of corporations throughout the United States, and they  
11 are basically an investment banker who specializes in ESOPs.  
12 THE COURT: Okay. So tell me, did people come in and  
13 have offices at People Care, like how did it work?  
14 MR. JOHANSON: I'm confident that the record will  
15 reflect, if we were ever able to produce that, that BCC spent  
16 time at their offices, they have spent time with their people  
17 at People Care; that Harvey Josephson and his CPA firm, who  
18 also responded here, who simply is just following the dictate  
19 of the holder of the privilege People Care today.  
20 THE COURT: So Josephson was the auditor.  
21 MR. JOHANSON: Yes, he was the CPA.  
22 THE COURT: You're claiming that that was an employee  
23 too, basically.  
24 MR. JOHANSON: Well, claiming according to my view,  
25 looking at our view, looking at the case law, the Eighth  
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1 Circuit case, and that's the one that we think fits as closely  
2 as possible, that --

3 THE COURT: The Eighth Circuit is out there. And on  
4 the other hand the Southern District Magistrate Judge cases  
5 have adopted a much narrower approach and have not found what  
6 the Eighth Circuit found.

7 MR. JOHANSON: I believe, your Honor, there are some  
8 Southern District cases that we've cited that also support the  
9 position that the Eighth Circuit has taken, and I'd be more  
10 than happy to go through those today, but they are in our  
11 pleadings.

12 THE COURT: No, I've read your pleadings, and I may go  
13 back and look at the cases more closely.

14 Let me ask you, though, of the 3600 or whatever  
15 documents that have not been produced on grounds of privilege,  
16 what percentage of those are because of the financial advisor  
17 or functional equivalent of an employee doctrine?

18 MR. JOHANSON: My understanding, your Honor, was that  
19 there were approximately 3600 entries on the various privilege  
20 logs and not 3600 documents. So I don't even know if the 3600  
21 documents is an accurate statement. It may not -- there may  
22 not have been an attachment, a document on each one of those  
23 e-mails. So -- and I can't, I can't tell you exactly how many  
24 of those were subject to the financial advisor, but it's not  
25 huge. I've got -- I presented those in our opposition. And

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1 there are a number of places where we're taking the privilege  
2 on, the work product position, for example, on the litigation  
3 that's going on involving the HRA and the labor unions and  
4 things like that, which we think are clearly protected under  
5 work product and/or attorney-client privilege. And that was  
6 being -- that was information, your Honor, that we were sharing  
7 with, my client was sharing with the financial advisor so we  
8 could handle the disclosure schedules properly in the  
9 transaction. And I don't believe that that should be subject  
10 to a waiver of privilege under those circumstances. Because  
11 that was information that they needed to know in order to help  
12 the company and its legal counsel to decide what to put on the  
13 privilege or on the disclosure schedules for the transaction.

14 THE COURT: But is that in anticipation of litigation?

15 MR. JOHANSON: It doesn't have to be in anticipation  
16 of litigation, just potential. You can -- if you're an  
17 attorney working on an ESOP transaction or a founder of a  
18 company working on an ESOP transaction, you can anticipate at  
19 some point you will be investigated by these gentleman here or  
20 some Other office in the United States, and that may or may not  
21 lead to litigation.

22 THE COURT: But I think you need a lot more than that  
23 for work product. You can't just sort of think, oh, there  
24 might be, you know, litigation. Because people litigate about  
25 these things.

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1 MR. JOHANSON: But, your Honor, the cases that I've  
2 cited were real cases at the time that were going on. So I  
3 know that --

4 THE COURT: No, no. I know you cited some cases. But  
5 I was talking about your idea that it's something you put on a  
6 disclosure schedule in anticipation of a transaction. But  
7 that's not anticipating litigation if a document really is  
8 prepared by an attorney or even a non-attorney for purposes of  
9 actually anticipated litigation, and I know you cited some  
10 cases, that's real work product.

11 MR. JOHANSON: I believe -- and I know you've given me  
12 your lead on your position. I do believe, however, that when  
13 you're doing an ESOP transaction and you've got ERISA as the  
14 bogey to comply with, and you have got to comply with a very  
15 complicated statute with a high oversight by the U.S.  
16 Department of Labor, you're in a position where anything you do  
17 could be challenged in litigation down the road. So I mean I  
18 understand and respect your opinion, your Honor.

19 THE COURT: Okay. You don't have to respect it as  
20 long as you understand it.

21 MR. JOHANSON: Thank you, your Honor. If you don't  
22 mind, I just got a couple more points today, until we go  
23 further of course.

24 THE COURT: Sure.

25 MR. JOHANSON: So I think I think the Secretary should  
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1 have returned those documents to us four or five months ago.  
2 It took them awhile to respond to that. They first sequestered  
3 it. They finally gave them back to us. We didn't know exactly  
4 what they had, so we wanted to get them back. And we took the  
5 position that they were privileged. And we believe it was a  
6 legitimate position based upon the financial advisor exception  
7 and/or functionally equivalent exception to the attorney-client  
8 privilege.

9 Again, I have to take big issue with Mr. Hartman  
10 saying there hasn't been any cooperation and that we, myself  
11 and my team have not cooperated with him. 108,000 papers of  
12 production demonstrates cooperation. Making changes to  
13 privilege logs whenever Mr. Hartman asks for the changes is  
14 cooperation.

15 We also have done a number of other things to support  
16 this investigation. We believe strongly in the position that  
17 our clients took in this case and/or in the transactions. We  
18 don't believe there is an ERISA prohibited transaction. We  
19 don't believe there are any violations, and we clearly don't  
20 believe there was any misleading or misrepresentation in the  
21 course of the transaction, and we take issue with that comment.

22 Again, your Honor, I guess I'd close with, and I could  
23 go into the case law more, but it's in our pleadings. Mr.  
24 Hartman mentioned lawyers not being listed, and I didn't quite  
25 understand that one. So I'm going -- I guess I'll have to wait

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1 until I come back on that one.

2 But one thing I'd like to finish with this Court,  
3 frankly, we think this doesn't -- isn't the proper setting to  
4 address this. I've got 15 examples that I think would educate  
5 your Honor or a Magistrate Judge about this situation. I'd  
6 like the opportunity to go through that with your Honor or a  
7 Magistrate Judge in-camera so that we would have the  
8 opportunity to show the examples of why we believe the  
9 financial advisor privilege applies here or why BCC and Harvey  
10 Josephson and his firm were financial advisors and functionally  
11 equivalent to employees here. We think that's the proper  
12 setting to do it. We think it takes more than 40 minutes in a  
13 hearing before your Honor, and we would appreciate the  
14 opportunity to do that. Mr. Hartman has not disagreed with  
15 that or has not contested that. I believe that would be the  
16 appropriate way to handle this matter, your Honor. Thank you.

17 THE COURT: Do you want to hand you the examples you  
18 gave?

19 MR. JOHANSON: I can, your Honor.

20 THE COURT: So I can page through them just to --

21 MR. JOHANSON: Yes.

22 THE COURT: Just for fun.

23 MR. JOHANSON: I'm not going to hand up my summary,  
24 I'm just going to hand up the actual examples and the first  
25 pile is what I think are the best examples. And thank you,

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1 your Honor.

2 THE COURT: Thanks. Did you want to reply to  
3 anything, Mr. Hartman?

4 MR. HARTMAN: Please, your Honor. Very briefly.  
5 These 15 examples, which of course the Secretary has not seen,  
6 are being tried trotted out to justify privilege logs with more  
7 than 3600 entries. To be clear, those were 3600 lines where  
8 there is an attachment. There actually may be more than one  
9 document, so there may be well more than 3600 documents being  
10 withheld here. And even if those are paradigmatic examples of  
11 privilege, there is no reason for the parties to sit down and  
12 hash through each of these 3600 or more examples.

13 As to the further points that Mr. Johanson raised.  
14 Mr. Johanson said that it was disingenuous for me to call  
15 attention to these Great Bank examples. I brought those to  
16 counsel's attention in February. Counsel left them on their  
17 logs for months and months. If they've been removed now, it's  
18 news to the Secretary.

19 And so it's not as if we're being hyper technical  
20 here. What it points to, again, is this real sloppiness that  
21 even in the -- when the Secretary calls these errors oars to  
22 respondents' attention, they fail to address.

23 On the work product, we concur with your Honor that  
24 hypothetical future litigation doesn't justify work product.  
25 The fact that there were these suits doesn't mean the

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1 documents, whatever which work product is asserted are  
2 connected in the meaningful way to those lawsuits.

3 On attorney-client, we think that respondents are  
4 doing a fine job of articulating the theoretical framework, but  
5 they're not laying out the facts that relate those principles  
6 to this case that show a connection to request by a client to  
7 an attorney for legal advice.

8 And then lastly, your Honor, we wanted to address the  
9 fiduciary examination, which we did not previously have the  
10 chance to address. The only response that respondents have put  
11 in their papers to our having raised the fiduciary exception is  
12 that their clients were occasionally acting as fiduciaries,  
13 not everything they did was wearing a fiduciary hat. But the  
14 Secretary's highlighted a number of examples that relate to  
15 plan administration, and that are at the time or after the time  
16 of the transaction, so.

17 THE COURT: So explain how this works. If it's within  
18 the role of planned fiduciary --

19 MR. HARTMAN: Yes.

20 THE COURT: -- then even if it's privileged, you can't  
21 assert the privilege?

22 MR. HARTMAN: Vis-a-vis the participants in the plan,  
23 those to whom a fiduciary duty is owed, or the Secretary of  
24 Labor, who stands in the shoes of those participants. Yes, the  
25 rule of fiduciary exception.

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1 THE COURT: So are you saying that as to all this  
2 stuff it's --

3 MR. HARTMAN: No, that's a subset of documents, which  
4 the Secretary highlighted specific examples of in his petition.  
5 Again, it's been difficult for the Secretary to pinpoint with  
6 accuracy which -- what the universe of those documents is.

7 The Secretary is not asking anything super human by  
8 asking respondents to give unique identifiers to these  
9 documents and stick with those documents. That's how parties  
10 negotiate and meet and confer and say, you know, respondents,  
11 document one doesn't appear to be privileged, the work product  
12 claim doesn't appear to be substantiated.

13 THE COURT: But he says that it's going to involve an  
14 incredible amount of work to create one uniformed privilege log  
15 as opposed to this whatever the seven they've done.

16 MR. HARTMAN: If there is -- if it's easier for  
17 respondents to maintain their seven privilege logs, the  
18 Secretary's willing to compromise and allow them to maintain  
19 that. But they need to maintain on each of them a unique  
20 identifier. Let me explain.

21 On the first privilege log there were some number,  
22 around 1500 documents. On the second log, I believe 100 of  
23 those documents were removed and the numbering completely  
24 change. So what was document 100 became document 95.

25 THE COURT: Didn't have the same description as  
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1 before?

2 MR. HARTMAN: No. The descriptions were changed as  
3 well. So there is no way for the Secretary to identify these  
4 documents over the various revisions.

5 I mean, you just need a basic unique identifier. It  
6 could be a bates stamp, it could be a number that doesn't  
7 changes. It can be a description that doesn't change. But  
8 they're changing everything. So we just need to know what  
9 we're talking about, then we can confer about this. We've  
10 already had a number of conversation and we were happy to have  
11 more conversations in the light of what we hope will be your  
12 Honor's rulings of law today.

13 THE COURT: What do you think about their idea of, you  
14 know, spending some time before a Magistrate Judge or I guess  
15 me, you know, doing an in-camera review?

16 MR. HARTMAN: If there were a narrow universe of  
17 documents that were disputed between the two sides where there  
18 were a legitimate claim for privilege on the log, there were  
19 questions as to the applicability of certain doctrines, the  
20 Secretary would certainly be willing to appear before your  
21 Honor or before a Magistrate Judge and to have that  
22 conversation.

23 But right now as to 3600 documents it's simply not  
24 practical. So if we can narrow down the universe, if  
25 respondents can narrow their claims of privilege, maybe by

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1 withdrawing these financial advisor claims, by withdrawing  
2 their work product claims, by withdrawing their claims of  
3 attorney-client privilege that are subject to the fiduciary  
4 exception, we may be looking at a much more narrow universe and  
5 then that may be --

6 THE COURT: How do you know what the financial advisor  
7 claim of privilege, for example --

8 MR. HARTMAN: We don't.

9 THE COURT: Oh, you don't know.

10 MR. HARTMAN: No.

11 THE COURT: But do you see in the body of the e-mail  
12 that it was sent to someone at BCC, for example?

13 MR. HARTMAN: Well, we don't have those e-mails so  
14 we've --

15 THE COURT: No, but in the description on the log.

16 MR. HARTMAN: Yes, we have a description of the log  
17 that was sent to someone at BCC or someone at Josephson or --  
18 frankly, there are other third parties that are not discussed  
19 in any of the affidavits. There is a consulting firm called  
20 Carl Marks, There are a number of investment banks that were  
21 consulted, and --

22 THE COURT: If you started a consulting firm and your  
23 name were Carl Marks, wouldn't you change your name?

24 MR. HARTMAN: I would, your Honor. I suppose he  
25 thought that, you know, the different spelling would save him.

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1 THE COURT: Yeah.

2 MR. HARTMAN: But --

3 THE COURT: Okay.

4 MR. HARTMAN: So the answer is, we don't know for  
5 certain. It's a doctrine that was raised in correspondence by  
6 respondents, and it's their burden to show privilege when  
7 they're raising privilege. We don't want to put them through  
8 on the rack, we don't want to put them unnecessary burden, but  
9 if they assert privilege as to those documents, they need to be  
10 prepared to prove that privilege.

11 THE COURT: Okay, thank you.

12 Mr. Johanson, did you want to address anything he just  
13 said, including the fiduciary exception?

14 MR. JOHANSON: If you don't mind just for a couple  
15 minutes, if you don't mind, your Honor.

16 THE COURT: Sure.

17 MR. JOHANSON: First of all, there is an identifier on  
18 the privilege logs that says -- that uses the word financial  
19 advisor a number of times in parentheses. So we have done  
20 that.

21 It's clear not only are the names of the people who  
22 Mr. Hartman is well aware of and Mr. Lund are well aware of  
23 were BCC and Josephson, but there is a parenthetical that  
24 addresses that. So we disagree with that.

25 Your Honor, on the issue of whether or not an attorney

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1 needs to be -- I'm not going to go into the case -- but I'd  
2 like to mention it to you -- the sender or the recipient, if  
3 you could please look at Baptiste V. Cushman, Southern District  
4 of New York 1994, we believe that that demonstrates that it  
5 doesn't always have to have an attorney on the e-mail, in  
6 addition to the other cases I've cited to you today and in our  
7 brief.

8 THE COURT: When you say an attorney on the e-mail?

9 MR. JOHANSON: Meaning that the attorney doesn't have  
10 to be the recipient or --

11 THE COURT: No, that's right. You could have a  
12 business person, one could be e-mailing business person two and  
13 saying Joe Lawyer just told me X, and that e-mail is privileged  
14 because the person is imparting legal advice within the  
15 company.

16 MR. JOHANSON: Exactly. And that's the position we're  
17 taking with respect to the financial advisor privilege and the  
18 functional employee equivalent.

19 THE COURT: So when company person X e-mails BCC  
20 person, you know, the lawyer said this, that's not a third  
21 party, that's --

22 MR. JOHANSON: But it's revealing what the lawyer said  
23 and/or revealing information that the lawyer's going to use in  
24 representing the client People Care Holdings in the course of a  
25 million dollar transaction. So that's our position, your

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1 Honor.

2 THE COURT: Okay.

3 MR. JOHANSON: The second one on the -- two other  
4 quick things if you don't mind.

5 THE COURT: Sure.

6 MR. JOHANSON: I point you, if you don't mind, your  
7 Honor to Pegram versus Herdrich, Supreme Court 2000 cert. from  
8 the Seventh Circuit, and in that --

9 THE COURT: Sorry, could I have the name again?

10 MR. JOHANSON: It's, I'll spell it for you, it's  
11 P-e-g-r-a-m v. H-e-r-d-r-i-c-h, Supreme Court 2000 cert. from  
12 the Seventh Circuit your Honor. And in that case -- and there  
13 a number of cases like this where the courts have indicated  
14 that you can have just -- if you think about it a little bit,  
15 you've got a president CEO of a company who might be an ESOP  
16 participant, who may be an ESOP committee member, not in this  
17 case, but in other cases, maybe a plan administrator, maybe a  
18 selling shareholder, so there is multiple hats. It's well  
19 established in the federal district courts and circuit courts  
20 throughout this country that you can wear multiple hats. And  
21 that it's only when -- and you don't become an ERISA fiduciary  
22 just buy fiat, just -- you know, you have to actually take  
23 action that is actionable. And our position here, your Honor,  
24 is that the only thing that the two individuals that we  
25 represent did was to select a blue chip independent

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1 discretionary institutional trustee, and Great Bank Trust  
2 Company. That's what they did. Based upon advice from BCC,  
3 based upon input from Harvey Josephson, based upon consultation  
4 with the corporate counsel, they served in a limited fiduciary  
5 royal to select Great Bank Trust Company as the trustee to  
6 select the ESOP advisory team to manage this transaction so  
7 that we would never have to appear in a court like this, your  
8 Honor. So they did that.

9 This case makes it clear, in my opinion, that a  
10 fiduciary can act in both fiduciary and non-fiduciary  
11 capacities. And I would just point to you that, you know, in  
12 this case that our gentlemen, who were our clients, they  
13 certainly acted in a non-fiduciary capacity when they were  
14 selling stock to the People Care Holdings employees stock  
15 ownership trust. They weren't acting as fiduciaries there.  
16 They were acting in a limited role as fiduciaries when they  
17 selected Great Bank. They had a limited monitoring  
18 responsibility, and this is established in the case law, when  
19 they had after Great Bank was selected as the trustee. But  
20 they couldn't monitor Great Bank when Great Bank was the  
21 independent discretionary institutional trustee doing the deal.  
22 They had, at that point they had selected somebody and they  
23 were, essentially, it. So I take the position, your Honor,  
24 that they were acting in certain nonfiduciary capacities quite  
25 a lot during the period of time 2008 -- 2007 and 2008, and that

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1 those are not subject to the ERISA fiduciary exception like Mr.  
2 Hartman would have you believe. I also would point out one  
3 other Supreme Court case, the Curtis Wright Corporation, that's  
4 w-r-i-g-h-t v. and I'll have to just spell this for you because  
5 I can't pronounce it, S-c-h-o-o-n-e-j-o-n-g-e-n, Supreme Court  
6 1995 cert. from the Third Circuit, your Honor. Again, same  
7 fact pattern and legal analysis as the Eighth Circuit. And we  
8 believe that the multiple hats could be worn, and that you're  
9 not always a fiduciary just because you happen to be a  
10 fiduciary for one particular event. And that's our response.  
11 Again, your Honor, going back to the other points, we  
12 just would ask you, either if you want to do it yourself  
13 certainly or refer it to a Magistrate Judge, to have the  
14 opportunity to try to address the types of examples. That's  
15 what helped in another case that we worked on is when we  
16 presented a few examples, and we had the guidance of an Article  
17 Three Judge like yourself or a Magistrate Judge to rule on  
18 particular aspects of that, and then go back. And we changed  
19 our production accordingly to meet the dictates of the rulings  
20 that we received. That's what we're asking today.  
21 We prefer not to have to combine the privilege log,  
22 but if your Honor -- if you believe that would help this  
23 process, your Honor, we'd be more than happy to do so at this  
24 time to respect the Court and the Secretary. And we do  
25 appreciate the time you've taken to listen to us today.

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1 THE COURT: Thank you. Let me ask you when you've  
2 done it before, you have both parties there, but the judge is  
3 looking at it in camera, you just have one party?

4 MR. JOHANSON: What we did was we had a session --  
5 what I've done before is we've had a session in live court in  
6 on the record taking our positions. And then the, either the  
7 Article Three Judge or the Magistrate would then give us some  
8 instruction on how they probably are going to rule on the  
9 particular issues as we go through some of these examples.  
10 Some of it was done in-camera, some of it was just done making  
11 arguments about the positions and examples of the positions.  
12 And then the Magistrate Judge or the Article Three Judge would  
13 then have us break for awhile, go out and meet and confer and  
14 try to make some progress on our dispute, and that's what I  
15 believe would be instructive here, your Honor.

16 THE COURT: Okay.

17 MR. JOHANSON: Thank you.

18 THE COURT: Thank you. I'm going to take a five  
19 minute break before I let you go, unless you have to leave.

20 MR. JOHANSON: No, no. We're good.

21 THE COURT: Okay.

22 MR. JOHANSON: Thank you, your Honor.

23 (Recess)

24 (In open court)

25 THE DEPUTY CLERK: All rise. You may be seated.

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1 THE COURT: Well, I'm going to address what I can  
2 today, and then have you go back and apply what I say, apply  
3 the principles of what I say, to the extent you can. And then  
4 with the new version, you know, presumably in a month or two,  
5 you can come back and I'll do an in-camera review if I need to.

6 But I do want to basically express a couple of rules.  
7 And in so doing I'm, I guess, I'm enforcing -- I'm granting the  
8 Secretary's petition to enforce administrative subpoenas in  
9 certain respects.

10 First of all, as a procedural matter I'm going to  
11 require the respondents to either do a single privilege log or  
12 to put unique identifiers in the categories of the existing  
13 privilege logs. Either of every those will suffice.

14 With respect to the financial advisor exception, from  
15 what I can see in the record I think that the assertions of  
16 privilege are too broad, insofar as they're based on the  
17 financial advisor exception for the following reason. I really  
18 believe that that exception is limited to situations in which  
19 the financial advisor is acting as a translator for the  
20 specific purpose, or at least the primary purpose of obtaining  
21 legal advice or is interpreting legal advice in a manner that  
22 requires his or her financial expertise.

23 But beyond that -- and when I say legal advice, either  
24 seeking or giving, I do not think that advising on how to  
25 structure the ESOP or advising in general on financial matters

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1 is legal advice simply by virtue of the fact that the  
2 transaction has lots of legal implications and legal  
3 ramifications. And I think that's a crucial distinction,  
4 because I think that dramatically narrows the scope of that  
5 financial advisor exception.

6 So I'm going to require respondents to go back and  
7 redo the privilege log with that those principles in mind.

8 Second, with respect to the de facto employee or  
9 functional employee doctrine. With respect to Josephson and  
10 BCC, and similar entities, certainly with respect to a counter  
11 party like Great Bank, which I don't think there is any dispute  
12 about, but also with respect to the others I mentioned, I don't  
13 think the respondents have met their burden of showing under  
14 the cases in the Southern District, which I adopt as  
15 persuasive, including Steinfeld V. IMS Health, and Export  
16 Import Bank versus Asia Pulp and Paper.

17 Under the approach in those cases, I do not believe  
18 respondents, who have the burden of establishing these entities  
19 are acting as functional employees in the relevant sense and,  
20 therefore, I do not believe that communications to and from  
21 those entities are within the circle of the employer for  
22 privilege purposes. So I think the respondents need to go back  
23 and redo their treatment of those entities.

24 With respect to work product, I'm not sure exactly  
25 what the assertions have been. But the clarification I want to

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1 make is that anticipation of litigation requires that specific  
2 litigation actually be anticipated, and not a general sense  
3 that something is likely to or might result in litigation. For  
4 example, this is the type of transaction that we're likely to  
5 be sued over. That, anticipation of that is insufficient to  
6 invoke the work product protection.

7 With respect to attachments to e-mails, I also want to  
8 clarify that -- I think this is undisputed -- but the fact that  
9 an attachment to an e-mail was then sent by e-mail to an  
10 attorney, even if for the purpose of seeking legal advice, the  
11 attachment doesn't become privileged unless it was an  
12 attachment that was created to show the attorney. If it was a  
13 preexisting document, obviously you can't -- well, maybe it's  
14 not obvious, but you cannot make it privileged by attaching it  
15 to an e-mail and sending it to the attorney.

16 If it's something that's created, that's I'm putting  
17 together this analysis and I'd like your advice on it, and it's  
18 created for the purpose of seeking legal advice, then that  
19 would be privileged, because that is the attachment itself is  
20 created for the purpose of obtaining legal advice. But if it's  
21 just a preexisting document that you send to an attorney, it  
22 doesn't thereby become privileged. And I do think that  
23 attachments have to be treated as separate documents that  
24 require some designation of whether they're privileged or not.

25 At this point I don't think I'm in a position to say

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1 that the fiduciary issue results in a waiver of privilege,  
2 because I don't know enough about -- I'm not able to  
3 distinguish this fiduciary versus non-fiduciary capacity. So  
4 I'm going to require an analysis of the privilege question,  
5 rather than some blanket exception based on fiduciary status.  
6 Those are the general principles I'm prepared to rule  
7 on today. What I think I would like is for the parties to go  
8 back with that in mind, take another crack at it, and then come  
9 back to me and we can do some sort of in-camera review where we  
10 do a sampling and run through, you know, to put more meat on  
11 the bones as to what specifically this entails. Does that make  
12 sense?  
13 MR. JOHANSON: Yes, your Honor.  
14 MR. HARTMAN: Yes, your Honor.  
15 THE COURT: Okay, why don't you meet and confer about  
16 timing of that.  
17 MR. JOHANSON: Thank you, your Honor.  
18 MR. HARTMAN: With respect to the rulings your Honor's  
19 made today, we'd also like your Honor to order the Secretary be  
20 permitted to reopen the depositions of Bruce Jacobson and Jerry  
21 Lewkowitz for two reasons. First, the Secretary anticipates  
22 that there are going to be additional documents produced that  
23 are going to be relevant to those depositions. And also the  
24 Secretary was previously prohibited from inquiring into  
25 communications between Mr. Lewkowitz and Mr. Jacobson on one

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1 hand, and BCC and Josephson on the other hand. And given your  
2 Honor's ruling on the financial advisor exception and the  
3 functional equivalent doctrine, those objections should now be  
4 very narrow, we think.

5 THE COURT: Why don't we wait, for efficiency  
6 purposes, why don't we wait until there's been a further  
7 production, unless there is -- is there some reason you need it  
8 in the next month?

9 MR. HARTMAN: I think we can wait, your Honor.

10 THE COURT: It probably makes sense, but there would  
11 be sort of additional reason to do it and reason to wait until  
12 there's been more production of documents, if there is going to  
13 be further deposition. Does that make sense?

14 MR. HARTMAN: Yes, your Honor.

15 THE COURT: Okay. Anything else for today?

16 MR. JOHANSON: May I be heard for two minutes, your  
17 Honor, just to complete a full record?

18 THE COURT: Absolutely.

19 MR. JOHANSON: Thank you. I appreciate that. I just  
20 wanted to, I do -- we did look at the Export Import case. And  
21 our position on that is it is distinguishable from -- and we do  
22 appreciate your order today, your, Honor, thank you -- we  
23 believe that it's distinguishable because we believe that one  
24 of the key facts in that case was Mr. Tan was just a simple  
25 consultant. He was not the kind of expert that we got involved

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1 in these particular cases. So we would argue that that's  
2 different.

3 We would argue that PCH circumstances are  
4 distinguishable because there's a very small fraction of the  
5 CPA's and investment bankers in this country who have expertise  
6 of the kind that was involved in this case, representing People  
7 Care Holdings.

8 Secondly, your Honor, I just wanted to point out a  
9 couple of facts that I neglected to raise earlier that I'd like  
10 you to be aware of. This is a small, People Care is a small  
11 closely held company. It's a family business that was owned at  
12 one point by -- partially by Mr. Jacobson's father, and now  
13 owned -- it was owned at the time of this transaction by two  
14 individuals who sold to the ESOP. Although they have 3600 home  
15 health care workers, they don't have a tremendous staff like a  
16 publicly traded company that you might have been associated  
17 with in your day at Cablevision. This is a small closely held  
18 business as far as we're concerned. And they just didn't have  
19 the people on staff to do the types of things that these  
20 particular financial advisors, BCC Capital and Mr. Josephson  
21 did.

22 I also would point out the Ross case, if you don't  
23 mind, your Honor, just for your further review. It's in the  
24 Southern District of New York, and we believe that it supports  
25 the position we've taken in this case. That's Southern

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1 District of New York 2004, Ross versus UKI Limited.

2 And, finally, on the issue of business advice versus,  
3 or business matters versus legal advice, I believe that the key  
4 test there in Pritchard and the Second Circuit is the  
5 predominant purpose. And we would argue that the predominant  
6 purpose here was the legal advice that was being provided to  
7 the client.

8 Thanks for allowing us to be heard and completing the  
9 record in this matter, your Honor.

10 THE COURT: Sure. Okay. Anything else for now?

11 MR. HARTMAN: No, your Honor.

12 MR. JOHANSON: No, your Honor. Thank you very much.

13 THE COURT: Thank you very much.

14 MR. RUBEL: Thank you.

15 (Adjourned)

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